Supreme Court, U.S.
FILED

(1)

No. 98-2033 APR 20 1999

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1998

ELKE SCHLOSSER,

Petitioner,

v.

TOWN OF WOODSIDE, a Municipal Corporation, and TOWN COUNCIL OF THE TOWN OF WOODSIDE,

Respondents.

Petition for Writ of Certiorari to the Court of Appeal Of the State of California, First Appellate District

PETITION FOR WRIT OF CERTIORARI

JOHN B. KEATING
Post Office Box 620622
2995 Woodside Road, Ste. 350
Woodside, CA 94062
(650) 851-5900
Counsel of Record for Petitioner

58pp

QUESTIONS PRESENTED

A. Does Due Process generally require a local government entity to give fair notice of an administrative appeal remedy if the governmental entity seeks to later assert that failure to exhaust that administrative remedy bars litigation over misconduct of government officials?

B. Does Due Process particulary require notice in the specific circumstances of government entity efforts to use the administrative remedies exhaustion bar to prevent an individual from seeking judicial protection from being divested of a vested right concerning completion of construction of one's home?

C. If an exhaustion of administrative remedies bar is potentially applicable to one claim between a citizen and the government, does the exhaustion of remedies doctrine bar all other related claims against the government, including (1) claims arising over a year after the time for pursuing the initial remedy and (2) claims that individually would not otherwise fall within any administrative remedy?

D. Is a local entity estopped from selectively applying retroactive administrative remedies requirements that are inconsistent with the local entity's own custom and practice?

LIST OF PARTIES

The parties to the proceedings in the California Court of Appeals were as follows:

Plaintiff/Petitioner was ELKE SCHLOSSER. Plaintiff/Petitioner has no corporate affiliation.

Defendants/Respondents were the TOWN OF WOODSIDE, a municipal corporation, and the TOWN COUNCIL OF THE TOWN OF WOODSIDE, the governing board of the Town or Woodside.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

PETITION 1

OPINIONS BELOW 2

STATEMENT OF BASIS OF JURISDICTION . . 2

STATUTES INVOLVED IN THE CASE 3

STATEMENT OF THE CASE 4

Introduction 4

Nature of the Case 5

Key Facts of the Underlying Controversy 6

Decision of the Trial Court 9

Decision of the Court of Appeal . . . 11

REASON FOR GRANTING THE WRIT 11

The Importance of Review 11

Review of the Exhaustion of Administrative Remedies Notice Issue Is Particularly Appropriate in These Factual Circumstances 15

The Factual Dispute as to The Exhaustion of Administrative Remedies 18

The September and October 1990 Correspondence Can Not Have Triggered a Duty to Exhaust Administrative Remedies as to All Aspects of this Litigation Because the Letters Do Not Address Some of the Rights at Issue 20

Due Process Guarantees Require That a Municipality Give Notice of an Appeal Right as a Precondition to Asserting a Bar by Failure to Exhaust Administrative Remedies with Regard to the Particular Appeal Right 21

Contrary to the Court of Appeal Conclusion, the Due Process Protections Should Not be Limited to Forfeiture Type Circumstances 25

The Town Inappropriately Took Advantage of Administrative Remedies Arguments it had Previously Waived . . 27

Respondent Should Have Been Estopped From Asserting That The October 19, 1990 Letter Was an Administrative Determination From Which Ms. Schlosser Should Have Appealed to The Town Planning Commission; And at the Minimum the Estoppel and Custom and Practice Issues were Determinations of Fact that the Court Should Not have Disposed of as a Matter of Law 28

CONCLUSION 30

APPENDIX Ap.1

California Supreme Court Decision Denying Petition for Review 2

Un-published California Court of Appeal Decision 3

San Mateo County Superior Court Order Denying Motion for Reconsideration 17

San Mateo County Superior Court Judgment . . 19

TABLE OF AUTHORITIES

Cases **Pages**

Abelleira v. District Court of Appeal
(1941)17 Cal. 2d 280 27

Doster v. County of San Diego
(1988) 203 Cal. App. 3d 257,
251 Cal. Rptr. 27

Graff v. Nicholi
370 F. Supp. 974, (N.D. Ill.1974) . . 26

Green v. Travelers Indemnity Co.
(1986) 185 Cal. App. 3d 544,
230 Cal. Rptr. 13 27,28

La Costa Beach Homeowners Assn. v. Wayne
(1979) 89 Cal. App. 3d 327,
152 Cal. Rptr. 355 27

Memphis Light, Gas, and Water Division v. Craft (1978)
436 U.S. 1, 98 S. Ct. 1554,
56 L. Ed. 2nd 30 22,26

Minor v. San Francisco
(1990)197 Cal. App. 3d 154,
268 Cal. Rptr. 919 23

Mission Housing Development Company v. City and County of San Francisco(1997)
59 Cal. App. 4th 55,
69 Cal Rptr. 2d 185 27

Mullane v. Central Hanover Bank & Trust Company (1950)
399 U.S. 306, 70 Sup. Ct. 652,
94 L. Ed. 865 21,22

Nasir v. Sacramento County Office of the D.A.
(1992) 11 Cal. App. 4th 976,
15 Cal.Rptr 2d 694 23

People v. Swink (1984)
150 Cal. App.3d 1076,
198 Cal. Rptr. 290 21-23

Petrillo v. Bay Area Rapid Transit District
(1988) 197 Cal. App. 3d 798,
243 Cal. Rptr 74 22

South Coast Regional Commission v. Harold Gordon (1977)
18 Cal. 3d 832 26

United States v. Superior Court of Los Angeles
(1941)19 Cal.2d. 189 27

Wallis v. Farmers Group, Inc.
(1990) 220 Cal. App. 3d 718,
269 Cal. Rptr. 299 27

Wilson v. Heath and Hospital, Corporation of Marin County (6th Cir. 1980)
620 F. 2d 1201 23-25

Yamaha Motor Corp. v. Superior Court,
(1986) 185 Cal. App. 3d 1232,
230 Cal. Rptr. 382 13

Statutes:

California Code of Civil Procedure
section 904.1(a) 2

California Rules of Court, Rule 28 2

Town of Woodside Municipal Code
section 36.01(C) 17
section 9-2.1401 3
section 9-2.1401 3

28 U.S.C. section 1257(a) 3

United States Supreme Court Rules:

Rule 13.3. 3

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1998

ELKE SCHLOSSER,

Petitioner,

v.

TOWN OF WOODSIDE, a Municipal Corporation, and TOWN COUNCIL OF THE TOWN OF WOODSIDE,

Respondents.

Petition for Writ of Certiorari to the Court of Appeal Of the State of California, First Appellate District

---

PETITION FOR WRIT OF CERTIORARI

Petitioner Elke Schlosser respectfully prays that a writ of certiorari issue to review the decision of the Court of Appeal of the State of California, First Appellate District, filed October 26, 1998, affirming the judgment of the Superior Court for San Mateo County dismissing this case on the basis

of failure to exhaust administrative remedies. A verbatim reproduction of the decision of the Court of Appeal showing its date of filing is attached in the appendix to this petition at page Ap.3.

OPINIONS BELOW

The non-published decision of the Court of Appeal of the State of California, First Appellate District (October 26,1998) is reproduced in the Appendix at page Ap.3. The Decision of the Supreme Court of the State of California denying Petitioner's petition for review (January 20, 1999) is reproduced in the Appendix at page Ap. 2.

The February 25, 1997 Judgment issued by the Superior Court of San Mateo County is unreported and is reproduced in the Appendix at page Ap. 19. The March 4, 1997 Order of the Superior Court of San Mateo County Denying Petitioner's Motion for Reconsideration is unreported and is reproduced in the Appendix at page Ap. 17.

STATEMENT OF BASIS OF JURISDICTION

The final judgment of the Superior Court of the County of San Mateo, California was appealed to the Court of Appeal of the State of California pursuant to California Code of Civil Procedure § 904.1(a) and the October 26, 1998 decision of the Court of Appeal was appropriate for the Petition for Review for discretionary review which was pursued to the Supreme Court of the State of California pursuant California Rules of Court, Rule 28. The Supreme Court of the State of California rendered its decision denying the Petition for Review on January 20, 1999.

The Supreme Court of the United States has jurisdiction on this Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1257(a). This Petition for Writ of Certiorari is timely under Supreme Court Rules, Rule 13.1.

STATUTES INVOLVED IN THE CASE

There are no federal or state statutes centrally involved in this case. The relevant local ordinance is the Town of Woodside Municipal Code provision regarding administrative appeals, as follows:

Sec. 9-2.1401 Appeals on administrative decisions.

> An appeal may be made to the Planning Commission by the applicant or any interested person on any administrative determination or interpretation made by the Planning Director or any Town officer under this chapter.

Sec. 9-2.1404 Procedure for Appeals.

> (a) All appeals shall be made in writing and shall state the nature of the application and the basis upon which the decision of the official or body is considered to be in error.
>
> (b) All applications for appeals shall be received by the planning Director or Town Clerk pursuant to Section 9-2.1403 of this article not later than ten (10) calendar days following the date of the actions on which such appeal is being taken.

STATEMENT OF THE CASE

INTRODUCTION

This petition for review tests whether due process requires at least some opportunity for notice of an administrative remedy before failure to exhaust that remedy is a bar to judicial review.

The case revolves around a litigation effort of a citizen of the Town of Woodside to try to force employee officials of the Town to afford the citizen the ordinary administrative remedies allowed other citizens of the Town. In particular, the citizen sought a writ of mandate to force certain Town officials who were hostile to her to nevertheless allow her to proceed with the ordinary process for appeal of a decision to the Town Council, the citizen oversight body of the Town. The citizen sought review of a particular planning decision made by those employee officials that was extraordinarily financially damaging to the citizen and had the appearance of being arbitrary, lacking in equity and potentially mal-motivated to an extent as to be particularly appropriate for review by the impartial citizen oversight body.

Ironically, the circumstance was turned on its head in that the Town officials ultimately succeeded in defeating the citizen's efforts to compel access to the administrative remedy by the device of claiming that judicial review was barred by failure to exhaust the same administrative remedies that the citizen was seeking.

Hence the case presents the equitable and Due Process issue of: Where a local government

entity has manipulated its procedures to deprive a disfavored citizen of the right to complete construction of her home, and then manipulated its procedures to preclude administrative review of the prior denial by selectively failing to give notice of the right to administrative appeal or even notice that the decision was final, can the government entity then use the failure to exhaust the administrative appeal remedy as a basis to prevent the citizen from seeking judicial protection from the governmental misconduct?

The decision rendered in this case departed from the ordinary Due Process protection of notice of the availability of an administrative remedy as a condition precedent to the requirement to exhaust that remedy. The California Court of Appeal in this case determined that notice of administrative remedies is not required in circumstances of a disputed claim of a vested right to complete approved property development.

Nature of the Case:

This writ of mandate case concerned the efforts of Petitioner Elke Schlosser to force the Respondent Town of Woodside to allow her to pursue an administrative appeal of a planning director's decision that prevented her from completing construction of her home. Respondent Town initially calendared the appeal, but after the appeal was fully briefed by Ms. Schlosser the Town officials refused to allow the appeal to go forward.

The Town of Woodside had initially approved Ms. Schlosser's home site development plans in 1985, approving the layout for three

buildings, a main house, a guest house and a barn. Ms. Schlosser built the two accessory buildings but was denied permission to complete the construction of her contemplated home. Although Ms. Schlosser contended that she had a vested right to complete the construction, the Town refused to process her building permit application.

The Town's attorneys attempted to justify the disparate denial of Ms. Schlosser's right to complete the last stage of her development plan by arguing that the vested right doctrine should be construed as a strict rule that a vested right can never exist under any circumstances unless a building permit has been issued. That notion is contrary to controlling California authority. It also was inconsistent with the Town of Woodside's own practice and ordinances.

Key Facts of the Underlying Controversy:

Elke Schlosser purchased property in Woodside in January 1985 seeking to build a main house, a guest house and a barn. Ms. Schlosser obtained site development approval from the Town of Woodside to accomplish such work on her property. Although she incurred substantial expenses in reliance on the promises that she would be able to complete the development as approved, she was not allowed to do so.

During the initial project review process Town agents were aware of the full scale of the development contemplated by Ms. Schlosser. The Town required Ms. Schlosser to obtain all discretionary site development approval of a plan showing all buildings contemplated to be

built on the site. Upon subsequent submission of a site plan reflecting each of the three buildings, the Town granted such a development permit. The Town assured Ms. Schlosser that all discretionary approvals had been granted and that the only additional review would be ministerial review of conformance with the Building Code. In reliance on that assurance Ms. Schlosser expended substantial sums for construction of the guest house and barn and for preparatory work toward construction of the main house.

After Ms. Schlosser obtained the first two of the building permits and built the guest house and barn, the Town Council passed a revised house size ordinance and re-zoned Ms. Schlosser's property. The Town used the new ordinances to frustrate Ms. Schlosser's ability to develop the property as the Town had initially approved. The Town did so to Ms. Schlosser despite grand fathering in other projects that similarly faced the frustrating ordinance change.

When Ms. Schlosser attempted to submit an application for a building permit for the main house, the Town Planning Department refused to allow submission of any application reflecting a size of house that would be consistent with the footprint approved in the earlier site development permit.

The Town ordinances provided for an administrative remedy of appeal to the Planning Commission and Town Council of any decision of the Planning Department. Ms. Schlosser attempted to pursue that administrative appeal remedy but she was refused the opportunity to appeal. Ms. Schlosser in fact filed an appeal of that

Planning Department decision. Although initially accepting the appeal and calendaring the hearing of the appeal, the Town later canceled hearing of the appeal.

The Town denied her the right based on two inconsistent arguments - the Town contended on the one hand that the vested rights decision was not the type of decision that could be considered on administrative appeal because it was a legal interpretation of the Town Attorney and then on the second hand contended that Ms. Schlosser lost her appeal right by failing to exercise it a year and a half earlier after receipt of correspondence from the Town regarding the vested right issue.

Ms. Schlosser contends that the prior correspondence the Town suggests triggers an administrative remedy deadline was merely one in a series of letters exchanged regarding the property and therefore could not have reasonably been construed as a final decision triggering the appeal remedy time. Moreover, Ms. Schlosser contends that due process requires that a municipality give its citizen notice of an administrative remedy prior to using that remedy deadline to divest the citizen of her vested rights. It was the Town's consistent practice to give such notice to other Town residents.

The Town's purported basis for changing its position was that the Town Attorney had determined that the appeal could be foreclosed in light of correspondence from a prior planning director the year before suggesting that there was no vested right. Nothing about that letter had suggested to Ms. Schlosser that it was a final determination, the letter

itself inviting further discussion about the potential building application.

Faced with the refusal of the Town to afford her the ordinary administrative remedy of an appeal of the planning director decision to not process her building permit application, Ms. Schlosser filed the instant writ of mandate action to compel processing of the permit and for declaratory relief to determine the vested rights issue.

Ms. Schlosser contends that she had a vested right to complete construction of her home, and that officials of Respondent Town unfairly blocked completion of construction of the home, doing so in retaliation against her and her husband for their expression of political opinion and publication of the self-dealing of a Town official.

Decision of the Trial Court:

The Town initially brought and lost a demurrer seeking to bar the case based on the threshold issue of whether there had been a full exhaustion of administrative remedies. The Town had argued that Ms. Schlosser should have sought an administrative appeal at the time of receipt of one of a series of letters concerning the Town's arguments in resistance to the property development. The judge handling that initial issue overruled the demurrer, thereby finding that it could not be determined as a matter of law that the administrative remedies had not been exhausted. The case proceeded into five years of litigation. At the first trial call, the Town again tried to have the case dismissed based on its claim that Ms. Schlosser should have pursued an earlier administrative appeal.

The different judge handling the argument on that second occasion again rejected the administrative remedies bar argument, refusing to rule that administrative remedies had not been exhausted. Instead, he took the matter temporarily off calendar to allow exploration at that time of other additional administrative remedy possibilities such as a variance application or settlement discussion.

At the final resumed trial call two years later, a different third judge again considered the administrative remedies bar argument, presented this time as a motion in limine. The third judge, again rejected the Town argument that the referenced earlier letter had constituted the point when administrative remedies obligations were triggered. Nevertheless, in reviewing the documents he found a subsequent letter which he concluded would trigger the administrative remedy obligation. He concluded that Ms. Schlosser had not exhausted administrative remedies because she failed to pursue an administrative appeal at the time of the additional letters exchanged between Ms. Schlosser and the Town several months after the letters the Town had referenced.

The trial court on that basis dismissed the writ of mandate action for failure to exhaust administrative remedies. The trial court rejected Ms. Schlosser's argument that she had no notice of the finality of the decision, no notice of the appeal right, no notice of the ten day time limit for such appeal right, nor even anything to indicate which of the various letters would be the event triggering the ten day deadline. The trial judge generally agreed with Respondent Town's position that "ignorance of the law was

no excuse" in such circumstances. However, the trial judge did indicate that he would consider a motion for reconsideration if Ms. Schlosser's counsel could find any authority for a notion that notice of the appeal right was required. Counsel supplied such authority in a subsequent motion for reconsideration, and specifically found authority criticizing the reliance in such circumstances on the maxim that ignorance of the law is no excuse. The trial judge nevertheless concluded that notice was not required and denied the motion.

Decision of the California Court of Appeal:

The Court of Appeal affirmed the judgment of dismissal, finding that the due process protections do not extend to circumstances where a vested right to build is in dispute. The Court of Appeal reasoned that denial of a claimed vested right to build would not be characterized as a denial of a right already in existence, and therefore is distinguished from the circumstances of forfeiture of property, which requires notice of the administrative remedy. The Court of Appeal also concluded that the appeal remedy was not limited to "final" decisions and that therefore the bar for failure to exhaust administrative remedies would apply even if Ms. Schlosser had not received a final decision on the vested rights issue.

REASON FOR GRANTING THE WRIT

The Importance of Review:

The Court of Appeals decision works an unreasonable restriction on due process protections. The reasoning of the decision is

circular. The Court of Appeal at page 6-7 of the decision distinguished Ms. Schlosser's case from the controlling due process authority as follows:

> "But the distinction between *Swink* and *Wilson* on the one hand, and this case on the other, is that here there was no "forfeiture" at all. Schlosser did not *forfeit* a property right she already possessed, but rather *failed to obtain* a benefit she sought, a permit to build a structure which did not conform with current zoning regulations."

That analysis begs the question in that the key issue of the case is whether the vested property right exists. In this case, that key vested right issue is a mixed question of law and facts. To conclude that due process does not apply to the adjudication based on initial presumption that the vested right does not exist effectively precludes adjudication of the existence of the vested right at all. The significant effect of the vested rights doctrine is to bring government conduct of a type constituting promissory estoppel within the due process protections. To say that due process does not apply unless the vested right is already determined, is to stand the whole vested right concept on its head.

A similar concern would exist as to the parallel limitation that might be construed to limit due process protections concerning any citizen right that is conditional . Some rights, like the vested rights at issue here, are conditional largely depending on whether the citizen achieves protection by the judicial system.

The due process notice requirement can not reasonably be understood to be limited to pure "forfeiture" type circumstances, as referenced in the decision. Moreover, even were the notice requirement dependent on the existence of forfeiture like circumstances, the forfeiture cases considered by the Court of Appeal are not so dissimilar from the instant circumstances to warrant a different approach. In this case, Ms. Schlosser also has a right to possession that was lost. Her right to her property was compromised.

The requirement that an applicant exhaust administrative remedies was instituted:

> 1. "[T]o lighten the burden of overworked courts in cases where administrative remedies are available and are as likely as the judicial remedy to provide . . . relief";
>
> 2. To facilitate "development of a complete record that draws on administrative expertise and promotes judicial efficiency"; and
>
> 3. To "serve as a preliminary administrative sifting process," which will unearth "the relevant evidence and provid[e] a record which the court may review."
>
> Yamaha Motor Corp. v. Superior Court, (1986) 185 Cal.App.3d 1232, 1240, 230 Cal.Rptr. 382, 386.

None of these policies underlying the exhaustion doctrine would be served by the catch-22 situation presented by this case. In

this case, where Respondents have refused to process Ms. Schlosser's application or to hear her appeal, all that would be served would be a facilitation of Respondents' ability to make unjust planning decisions, provide unclear statements of decisions to applicants, and then deny applicants their day in Court.

To the extent that exhaustion of administrative remedies is a jurisdictional prerequisite, it is appropriately a threshold barrier, rather than a argument to be raised subsequently at motion in limine. If it is dealt with at trial without regard to prior denial at demurrer, then the evidentiary basis of the requirement should be considered, rather than determination as a matter of law. In this case, Ms. Schlosser made offer of proof to show that the Town's ordinary practice was to give notice of any final decision triggering such an appeal right, a practice which was breached in this case. Offer of proof was also made to show it was the Town's custom and practice to neither afford nor require such an administrative remedy in circumstances of similar planning department interim correspondence. (Transcript, January 6, 1997 p. 5 ln. 12 - p. 6 ln. 13; p. 36 ln. 15-17)

Where an underlying ordinance scheme is unconstitutional, reliance on administrative remedy requirements therein is not sufficient to stop review of the deprivation. Here, where the appeal provision of the municipal ordinance does not provide for notice, it can not be consistent with due process requirements, therefore is unconstitutional and therefore can not bar the citizen's protection from the court. Moreover, in these circumstances where notice was routinely

offered to others but denied Ms. Schlosser, the ordinance would be unconstitutional as applied, implicating equal protection concerns.

In circumstances where a trier of fact may find that the denial of access to the administrative remedies afforded other citizens arose as a consequence of trickery and deliberate disparate treatment, judicial decision that administrative remedy requirements will bar Schlosser from ever having her day in Court logically should not be made without allowing Schlosser to at least present evidence in support of her claim that she should be equitably relieved from administrative remedies requirements in light of the access barriers presented.

The due process issues implicated by the government entity's aggressive use of the requirement that a litigant exhaust administrative remedies - even aggressively using the bar to preclude efforts of the citizenry to gain access to administrative remedies - present important questions of law. Those issues include the general subject area of the extent to which due process protects development expectations. Review of this case would benefit settlement of those issues.

REVIEW OF THE EXHAUSTION OF ADMINISTRATIVE REMEDIES NOTICE ISSUE IS PARTICULARLY APPROPRIATE IN THESE FACTUAL CIRCUMSTANCES

Review of application of the administrative remedies bar is appropriate in light of the due process concern that the Town did not provide the required predicate notice of finality and appeal right in this case

although it was the Town's custom and practice to give such notice to others. Allowing such a standard for application could lead to widespread abuse. Moreover, the Town's administrative remedies argument at most can apply to only one aspect of the vested right issue, and is irrelevant to the other bases for the vested right, nor to the other deprivation issues presented by this case. That issue of whether a bar of otherwise isolated application can be expanded to apply more globally to preclude any judicial protection of citizenry facing repeated problems with the particular local government entity is a significant issue worthy of the Court's review.

The evidence at trial would establish that the Town manipulated its procedures to avoid giving notice and administrative remedies to Ms. Schlosser, although giving notice and remedies to others. The Town achieved its ends by failing to give adequate general public notice and then selectively giving special notice to some residents but not others. Ms. Schlosser's claims that certain ordinances can not be retroactively applied to negate her approved plans and rights is in part based on the failure of the Town to comply with notice requirements. The Town is appropriately estopped from asserting the exhaustion of administrative remedies bar. Moreover, the unusual conduct at issue and the custom and practice of the Town of Woodside establishing the extent of the administrative remedy at issue are factual issues not properly decided without review of evidence. As such, the summary ruling of the trial court was both premature and erroneous.

The Town of Woodside Municipal Code at

§36.01 (C) provides that "No right of appeal to the Council from any administrative decision made by an official of the Town pursuant to the provisions of this Code shall exist when such decision is ministerial ...." The Complaint in this action seeks review of some ministerial as well as some discretionary acts (CR 1220 par. 4). Therefore, the Town Code appeal remedy which applies only to discretionary acts can not completely preclude adjudication of this action, as it would not apply to preclude review of the ministerial acts.

Moreover, Ms. Schlosser is not properly held to the standard the Town applies that "ignorance of the law is no excuse" as applied to the appeal requirement because the Town Code was not readily available for public viewing. There was no current codification of the various Town ordinances at the time the appeal remedy supposedly ran. Therefore, even if Ms. Schlosser had been prescient enough in September 1990 to figure out that the particular interim correspondence might trigger a final decision appeal requirement, there was limited opportunity to determine whether there was in fact an applicable appeal requirement. It is unfair for the Town to use secret laws to set up barriers to preclude review of its administrative decisions.

Ms. Schlosser adequately exhausted her administrative remedies given the statement and instructions provided by the previous Planning Director, Nancy Alexander. If she failed to exhaust, it was because the misleading and/or unclear nature of the Planning Director's letter induced her to, and the Town should be estopped from applying the bar.

The Factual Dispute as to The Exhaustion of Administrative Remedies:

There was a factual dispute whether prior Planning Director Ms. Alexander's September 12, 1990 letter or the October 19, 1990 letter represented a final official determination by the Town and whether the facts leave the Town estopped to claim such bar by virtue of the Town's failure to give notice of the appeal right. As a factual dispute, the determination of the issue of exhaustion of administrative remedies was not properly the subject of disposition by the trial court without full determination of the facts by the appropriate fact finder. Hence the Court erred in reaching a conclusion as a matter of law that Schlosser failed to exhaust an appeal right in such circumstances where the existence of the appeal right is a contested issue of fact upon which Schlosser seeks to present evidence.

As an offer of proof, Schlosser was prepared at trial call on January 6, 1997, to present documentary evidence and witness evidence establishing that an ordinance passed in early 1990 that would have the effect of determining whether Schlosser and only a few other residences would be afforded an administrative remedy, was scheduled with quiet speed to occur during a time frame that the Town had been notified by Schlosser that she and her husband would be out of the country and unavailable.

Nothing about the September and October 1990 letters indicated either was a final decision on the development right. Evidence at trial would establish that neither Schlosser nor the Town so construed it at the

time, and both would have acted differently had they believed it to be a final decision. The September 12, 1990 letter comments on one basis for the right to build, a basis which Schlosser was not advancing.

Within several days after receipt of the confusing September 12, 1990 correspondence from the Town, Schlosser's husband sent back a letter asking to receive a copy of the so called "opinion" of the Town Attorney and also requested clarification of several confusing and apparently meaningless aspects of the letter. (C.T. 780) Although, such a determination of loss of a vested right requires a hearing and specific findings, there had been no such hearing and there was no such written opinion of the Town Attorney to be had. That request for clarification, coming almost immediately after receipt of the September 12, 1990 letter, came within the 10 day appeal period the Town subsequently attempted to impose on Schlosser, and during that period put the Town on notice that its letter required further clarification and was not construed to be a final decision.

Several weeks later on October 19, 1990 the Planning Director sent a letter purporting to respond to the request for clarification. (C.T. 782) However, the Planning Director's letter did not clarify what was meant by the prior September 12, 1990 letter. Rather, it stated a different reason for denying the right to build. The Town never repeated and apparently has abandoned the opinion referenced in the September 12, 1990 letter. Nor has the Town ever clarified what it meant by the September 12, 1990 letter. Ms. Schlosser proffered testimony that she understood and expected that the Town would

advise her as to what procedures needed to be followed, as they had in the past, both to her and others.

The September and October 1990 Correspondence Can Not Have Triggered A Duty To Exhaust Administrative Remedies As To All Aspects Of This Litigation Because The Letters Do Not Address Some Of The Rights At Issue:

Neither the September or October 1990 letters logically can be a final decision creating an administrative remedies exhaustion bar to review of the November 1991 decision except to the extent that the later decisions were dependent on the September or October 1990 correspondence. Even if the earlier letter were construed to be notice of a final decision that no vested right existed to build the previously planned house, it can not be construed as a final decision as to the right to apply for a building permit, for such decision could be dependent on an exception, exemption or variance. Hence, the September and October 1990 correspondence can not be construed as a final determination with regard to the later dispute over the failure to process the permit application or hold an appeal hearing. If the right to appeal the later planning director decision in part is to test whether the planning director was correct that the prior determination was a final decision, it is circular logic to claim that the finality decision can not be reviewed because the Town Attorney already determined that it was final.

Due Process Guarantees Require That a Municipality Give Notice of an Appeal Right as a Precondition to Asserting a Bar by Failure to Exhaust Administrative Remedies with Regard to the Particular Appeal Right:

Assuming arguendo, that either the September 12, 1990 or the October 19, 1990 letter was a final determination, due process requires that a municipality give notice of the right to appeal prior to arguing that the failure to appeal is a failure to exhaust administrative remedies. As articulated by the United States Supreme Court, the fundamental due process opportunity to be heard is meaningless unless one knows that a matter is pending and can choose whether to appear, default, acquiesce, or contest. (Mullane v. Central Hanover Bank & Trust Company (1950) 399 U.S. 306, 314, 70 Sup. Ct. 652, 657, 94 L. Ed. 865; People v. Swink (1984) 150 Cal.App. 3d 1076, 1080, 198 Cal.Rptr. 290, 292. Such notice of right to contest a decision is required to create a duty to exhaust administrative remedies (People v. Swink, Supra.150 Cal.App 3d at 1080-1082, 150 Cal.Rptr. at 292-294.

In the Swink case, notice to a defendant that bail would remain forfeited until appearance was held to be a denial of due process in that it failed to inform the defendant of the procedure and time period limitation for setting aside the declaration of forfeiture. The Swink court noted that

> "The trial court's impression procedural due process does not require informing individuals of their individual rights conflicts

with the elementary and fundamental nature of the requirement of notice to guarantee procedural due process." Swink, supra 150 Cal.App. 3d at 1082, 198 Cal.Rptr. at 294.

The Swink opinion relied on the United States Supreme Court cases of Mullane and Memphis Light, Gas Water Div. v. Craft (1978) 436 U.S. 1, 14, 98, S.C. 1554, 1562, 56 LED. 2d 30, in concluding that the due process clause requires an informative notice designed 'to apprise the affected individual of, and permit adequate preparation for, an impending 'hearing'." Swink , supra. , 150 Cal.App. 3d at 1081. The California Supreme Court, the Ninth Circuit, and the California First District Court of Appeal have all previously cited and applied this important protection articulated in the rational of the Swink case.

As clarified by the California First District Court of Appeal in Petrillo v. Bay Area Rapid Transit District (1988) 197 Cal.App. 3d 798, 808, 243 Cal.Rptr. 74, 79, in relying on the Swink case, the real issue is the extent of due process protection needed and the type of procedure which is therefore required. The Petrillo case notes the special heightened scrutiny of the due process deprivation at hand necessary where the communication from the government entity has the effect of misleading the citizen into a belief that the process of determining the citizen's rights is continuing. The court in quoting extensively in its reliance on Swink concluded that the particular uncertainty of the letter determination at issue 'could have the effect of lulling a recipient such as appellant into a false sense of security in the belief that the letter is simply some kind

of preliminary notice and that further notice of the hearing would be forthcoming." (Emphasis added) Petrillo, supra 197 Cal.App 3d at 809. Due process scrutiny prior to application of an administrative remedy bar to judicial review is also warranted in this case as such uncertainty is similarly evident from the series of communications back and forth between the Schlosser and the Town of Woodside during the time of the letter that the Town retroactively designates as the point of determination.

The California First District Court of Appeal again cited from and followed Swink in Minor v. San Francisco (1990) 197 Cal.App 3d 154, 268 Cal.Rptr. 919. Not only did the Court follow Swink in finding that the notice of forfeiture was constitutionally deficient when it did not provide notice of the underlying statutory scheme involving the forfeiture process and controlling time limitations for seeking to set aside forfeiture, the court also agreed with the court in Wilson, supra, that "it is unrealistic to require each individual to be conversant with the procedural provisions of municipal or statutory law" and that it is not adequate for the government simply to rely upon the time worn adage "ignorance of law is no excuse." See also Nasir v. Sacramento County Off. of D.A (1992) 11 Cal.App 4 at 976, 985-86, 15 Cal.Rptr 2d 694, 699-700 citing Swink wherein the Court of Appeal held that the district attorney's declaration of forfeiture (under drug forfeiture laws) was invalid for failure to give proper notice of right related to the proceeding, including instructions for filing a claim. The Court noted:

"Stated another way, we must reject

> the district attorney's anomalous position that a claimant must rigidly comply with statutory procedures but close is good enough for government work".

In this case the decision does not hold to that standard. There can be no question that the subject September 12, 1990 letter did not afford such notice of a right of appeal or a deadline for doing so. Nor did the October 19, 1990 letter.

For the trial judge to determine that either the September 12, 1990 or the October 19, 1990 letter or any subsequent letters gave such required notice of right to appeal it would have been necessary to consider evidence of the customs and practice of the Town of Woodside, and evidence of the Town of Woodside's own interpretation of that letter. Schlosser was prepared to present evidence on that issue. As an offer of proof of the type of evidence that could have been presented even from the mouth of the Town employees, Schlosser also offered to present evidence that it was a custom and practice of each f the relevant Town employees - the Town's current Planning Director, the particular former Town Planning Director who sent both the September 12, 1990 letter and the October 19, 1990, and the prior Planning Director -- to give notice on occasions when the Planning Department was making a final determination. Schlosser would have additionally been able to introduce documentary evidence with regard to the practice of giving such notice by that Planning Director, such as letters reflecting notice of appeal of a decision in the same time frame regarding similar property rights issues.

Schlosser also offered to present proof of her reliance and her husband's reliance on the Town to provide direction as to what needed to be done to comply with the Town's Planning Department rules and procedures. Schlosser would have testified that she precisely followed and relied on the Town's directions in the initial approval process in 1985 and in 1990 repeatedly forwarded correspondence to the Town requesting information on what she needed to do to pursue her right to build her home.

Contrary to the Court of Appeal Conclusion, the Due Process Protections Should Not be Limited to Forfeiture Type Circumstances:

The due process requirements are not limited to money forfeiture circumstances. In the Wilson v. Heath and Hospital, Corporation of Marin County (6th circuit 1980) 620 F.2d 1201, 1214 case the Court applied the due process requirements to circumstances of property rights deprivation. The Wilson Court concluded:

> "Mullane and the due process clause require personal notice of the individuals's right to a hearing prior to the government's depriving the individual of any property interest, notwithstanding the 'notice' provided by the public character of the ordinance itself. "
>
> . . . .
>
> We also believe it is unrealistic to require each individual to be conversant with the procedural provisions of city or county ordinances, especially where the individual is faced with potential condemnation of his property if he

misreads or is not entirely familiar with that ordinance and is not informed of his right to appear to contest the condemnation. When the individual fails to exercise the fundamental procedural right to a hearing granted to him under the ordinance and required by due process because he was not informed of that right by the government authorities, **we do not believe it is adequate for the government simply to rely upon the time worn adage that 'ignorance of the law is no excuse'.** Thus we find that appellee's notice procedure of relying upon the public character of the ordinance was not 'reasonably calculated' to inform appellant of the availability of a hearing and that personal notice is required and will not impose an unreasonable burden on the appellees. Memphis Light, Gas, and Water Div., supra; Graff v. Nicholi 370 F. Supp. 974, 983-84 (N.D. Ill.1974)."

The Memphis Light v. Craft (1978) 436 US 1, 98 S. Ct. 1554, 56 LED. 2d 30 opinion which also concluded that the petitioner had deprived the respondent of an interest in property without due process of law because the notice was not sufficient similarly is not limited to forfeiture issues. Even the cases relied upon by the Town specifically note compliance with the threshold issue of sufficiency of due process notice before looking at application of the requirement for exhaustion of administrative remedies. (Abelleira v. District Court of Appeal (1941) 17 Ca;.2d 280, 283 - involving efforts to circumvent administrative remedies remaining available; South Coast Regional Commission v. Harold Gordon (1977) 18 Cal.3d 832, 837; La

Costa Beach Homeowners Assn. v. Wayne (1979) 89 Cal.App. 3d 327, 152 Cal.Rptr. 355, 357; United States v. Superior Court of Los Angeles (1941) 19 Cal.2d. 189, 192.)

The Town Inappropriately Took Advantage of Administrative Remedies Arguments it had Previously Waived:

The defense of failure to exhaust administrative remedies may be waived if not timely asserted. See Mission Housing Development Company v City and County of San Francisco(1997) 59 Cal. App. 4th 55, 69 Cal Rptr. 2d 185; Green v. City of Oceanside (1987) 194 Cal.App.3d 212, 239 Cal.Rptr. 470; Doster v. County of San Diego (1988) 203 Cal.App.3d 257, 260, 251 Cal.Rptr. 507; cf. Wallis v. Farmers Group, Inc. (1990) 220 Cal.App.3d 718, 269 Cal.Rptr. 299 [exhaustion of internal remedies].

The court in Green further explained,

> As the Abelleira opinion makes explicit, its discussion of jurisdiction is solely for the purpose of determining when a writ of prohibition will issue. . . . Abelleira makes abundantly clear that the exhaustion doctrine does not implicate subject matter jurisdiction but rather is a "procedural prerequisite" "originally devised for convenience and efficiency" and now "followed under the doctrine of stare decisis, ..." [citation] It is "jurisdictional" only in the sense that a court's failure to apply the

rule in a situation where the issue has been properly raised can be corrected by the issuance of a writ of prohibition.

Green at 221-222.

Respondent Should Have Been Estopped From Asserting That The October 19, 1990 Letter Was an Administrative Determination From Which Ms. Schlosser Should Have Appealed to The Town Planning Commission; And at the Minimum the Estoppel and Custom and Practice Issues were Determinations of Fact that the Court Should Not have Disposed of as a Matter of Law:

The circumstances of this case meet the standards under California law for equitable estoppel. Green v. Travelers Indemnity Co. (1986) 185 Cal.App.3d 544, 556, 230 Cal.Rptr. 13.

In his January 6, 1992, letter to Ms. Schlosser, Town Planning Director Curtis Williams identified a particular letter that was the supposed trigger – its stated premise for refusing to process the appeal was the letter of September 12, 1990 sent by then Planning Director Nancy Alexander.

Additionally, the last sentence of the third paragraph of the Planning Director's letter concluded "Also, the vested rights issue is a legal determination, not an interpretation of the Town's zoning code subject to appeal." (Exhibit E to the Complaint(C.T. 22))

Hence the Town in 1992 took a contrary position from what it took in 1997. In 1992 the Town refused to allow appeal of the vested rights issue on the grounds that it is not appealable while in 1997 the Town avoided adjudication with the inconsistent argument that any vested rights determination should have been appealed earlier - despite the communication from the Planning Director reflecting the Town Attorney's opinion that such vested rights issues were not appealable.

Mr. Williams letter is sufficient to equitably estop Respondent from asserting other bases for justifying its refusal to accept Ms. Schlosser's appeal. Mr. Williams letter indicates that the Town was apprised of the facts as it states the Planning staff and Town attorney had reviewed the matter. Ms. Schlosser would reasonably have a right to believe that, based on the letter, the Town was relying on Ms. Alexander's September 12, 1990, letter as the basis for refusing to accept Ms. Schlosser's appeal. Ms. Schlosser was ignorant of any other basis for the Town's refusal to process her appeal. Finally, in reliance on Mr. Williams, Ms. Schlosser engaged in lengthy litigation with the Town to show that the September 12, 1990, letter was not a determination from which she should have appealed. At a minimum, a question of fact exists as to whether the Town should be estopped from relying on the October 19, 1990, letter in support of its argument that Ms. Schlosser failed to exhaust her administrative remedies.

Additionally, respondent asserted an affirmative defense in its answer that Ms. Schlosser failed to exhaust her administrative remedies "due to a failure to timely appeal

the determination in September 1990 that she had no vested right to proceed." Respondent made no mention of a determination in October 1990, the letter on which the Judgment was based.

CONCLUSION

The Court of Appeal decision in this case limiting the scope of due process protections presents an important issue of law. Petitioner respectfully submits that the need for clarification of the application of due process protections to determination of vested rights to develop property is of widespread import, and worthy of review by the Supreme Court. Moreover, the civil liberties issues with regard to the local government entity mistreatment of the particular citizen in this case warrant attention by the Court. After years of refusal to afford Ms. Schlosser the same administrative remedies afforded to others, the Town should not be allowed to deprive Ms. Schlosser of her vested right to complete her home merely because Ms. Schlosser did not happen to guess that one particular letter in a flood of correspondence might be held up years later as the point of final determination of her vested rights.

Dated: ~~April~~ June 19, 1999

Respectfully Submitted,

John B. Keating, Attorney for
Petitioner Elke Schlosser

APPENDIX

California Supreme Court Decision Denying Petition for Review 2

Un-published California Court of Appeal Decision 3

San Mateo County Superior Court Order Denying Motion for Reconsideration 17

San Mateo County Superior Court Judgment . 19

S075267

IN THE SUPREME COURT OF CALIFORNIA

ELKE SCHLOSSER, Appellant,

v.

TOWN OF WOODSIDE et al., Respondents

Appellant's petition for review DENIED.

Filed: January 20, 1999

Mosk

Acting Chief Justice

Filed: October 26, 1998

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

ELKE SCHLOSSER,

Petitioner and Appellant, A078286

V.

TOWN OF WOODSIDE et al., San Mateo County Super. Ct. No. 370172)

Respondents.

Elke Schlosser appeals from a judgment denying her petition for a writ of mandate by which she sought an order compelling, the Town of Woodside (Town) to issue a building permit for a 12,000 square foot residence on her property. She contends the trial court erred by ruling the action was barred by her failure to exhaust administrative remedies, and by denying her motion to amend the petition.

FACTUAL AND PROCEDURAL BACKGROUND

In 1985, Schlosser purchased a six-acre parcel of real property in Woodside, upon which she and her husband, Peter Bullock, intended to build a primary residence, guest

house and barn. After obtaining a grading permit and two building, permits, Schlosser built a 4,004 square foot house and garage, and a stable. Her site development plan also contained a "footprint" indicating the size and location of a proposed "main house to be constructed in the future." On January 8, 1990, Schlosser informed the Town planning department she was ready to begin building her main residence, and requested advice on how to proceed. Her letter stated, "My approved plans from the County of San Mateo indicate a footprint ground coverage of approximately 12,000 square feet."

Senior Planner Mignone Wood replied by letter, outlining the procedures for obtaining the requisite permits and a variance to reclassify the existing residential structure as a guest house or rental unit. Schlosser was instructed to review an enclosed packet of information, and to schedule a preapplication conference with the appropriate officials. Schlosser wrote back asserting that county's 1985 approval of a plot plan which included the "future main house location," conferred a vested right to build her "main house in the square footage dictated by the approved footprint."

Schlosser and Wood corresponded throughout the spring and summer of 1990. Wood explained that a building is not "appoved" until Town's planning director approves the detailed engineering and architectural drawings necessary to obtain a building permit. Schlosser claimed that Town had issued the building permits for her guest house and bam based on a site plan which included a footprint for the future main house location, and that a soil report had also been prepared

on that basis. Planning Director Nancy Alexander wrote to Schlosser suggesting several options she might consider in light of "existing conditions and the current regulations." Schlosser reiterated that as a result of an earlier geological study, "my rights vested to build the future main house in that size and that location," and threatened litigation if building permits were not issued on the' basis of her 1985 "site plan."

In a letter dated September 12, 1990, Alexander informed Schlosser, "It is the Town Attorney's opinion that the building permit activities in 1985 and the geologist's review in 1986 do not convey any form of vested right to build a new main residence." In closing, as was her wont, Alexander invited Schlosser to telephone if she had any questions and/or to set up an appointment for a preapplication conference. In response to Schlosser's requests for further clarification, Alexander replied on October 19, 1990, "It is the Town Attorney's opinion that a building permit is a prerequisite for any vested rights. The Town's records do not include a building permit for the structure you describe as a future main residence."

On February 13, 1991, Town attorney Robert Lanzone replied to a letter from Peter Bullock: "My review of the extensive correspondence between staff and Ms. Schlosser indicates that her letter of September 14, 1990, was responded to. I am enclosing a copy of an October 19, 1990, letter. [¶] It seems to me we have been over this ground before. I have reviewed the permits issued, and looked at the geologic studies. The matter has been discussed with staff. I have reviewed all of

the correspondence that has been sent to the Town. I understand your wife's argument and simply do not agree with her legal conclusions. [¶] I cannot see any reason to review this matter any further."

On November 14, 1991, after meeting with Town's new planning director Curtis Williams, Schlosser's architect wrote to ask how to proceed with construction reasonable facsimile" of the main residence outlined on the 1985 site plan. On December 5, Williams replied that since there were no permits "currently approved and active" relating to that residence, "there would appear to be no vested rights to develop as per plans submitted in 1985, which schematically show a 'future main residence location' on the site." He attached the applicable regulations regarding maximum residence size (6,000 sq. ft.) and floor area limitations, and pointed out that variances would be required in order to exceed those standards. On December 17, Schlosser wrote to Williams "Re: Appeal of Decision of Planning Director," again claiming she had received "discretionary approval" for a three-building project, and had "acquired a vested right to complete the project" by dint of substantial expenditures made in reliance on the alleged approval.

On January 6, 1992, Williams informed Schlosser and Bullock that their appeal was "not proper and may not be processed." Quoting from his predecessor's September 12, 1990, letter denying them "any form of vested right to build a new main residence" (*ante*, p. 2), Williams concluded, "Any appeal of a determination regarding that issue should therefore have been filed at that time, not with a renewed request of another Planning

Director. Also, the 'vested rights' issue is a legal determination, not an interpretation of the Town's Zoning Code subject to appeal." In response to Schlosser's objection that she was deprived of due process by Town's failure to inform her of appellate rights on September 12, 1990, Williams reiterated the Town attorney's opinion that "your appeal is not appropriate to be heard by the Planning Commission."

On February 5, 1992, Schlosser filed a petition for administrative and/or traditional mandamus (Code Civ. Proc., §§ 1094.5, 1085)[1] and complaint for declaratory relief. She requested a writ "directing [Town] to accept and process [her] building permit application and to issue a building permit for a primary residence of up to 12,000 square feet in size pursuant to the Site Development Plan approved by Respondent Town in 1985," and a declaration of the parties' rights and duties with respect to her "vested right to construct a primary residence on her property."

Town's demurrer on the ground of failure to exhaust administrative remedies was overruled. In its answer to Schlosser's petition/complaint, Town again asserted the action was barred by her "failure to timely appeal the determination in September 1990 that she had no vested right to proceed." Schlosser moved to amend her petition/complaint by, among other things, adding four new causes of action which essentially alleged violations of her civil rights. The trial court denied that motion,

---

[1] Unless otherwise indicated, all statutory references are to the Code of Civil Procedure.

and her motion for reconsideration of its ruling as well. (See post, pp. 8-10.)

On the first day of trial, the court took the matter off calendar to give Schlosser a chance to actually apply for a building permit for the projected main residence, albeit with little hope of settlement. When trial resumed 20 months later, the court scheduled a further hearing limited to the issue of exhaustion of administrative remedies, and then, if necessary, admissibility of evidence outside the administrative record (§ 1094.5, subd. (e)). After hearing argument on January 6, 1997, the court concluded that on September 12, 1990, or by October 19, 1990, at the latest, Schlosser was well aware of Town's determination that she had no vested right to build her proposed principal residence, and her failure to appeal from that determination constituted a fatal failure to exhaust administrative remedies. The court commented that it agreed with Town on the merits, but expressly based its ruling on Town's affirmative defense regarding the failure to exhaust administrative remedies. The court rejected Schlosser's contention that Town was legally obligated to notify her of her right to appeal, but offered to reconsider "if you can find me a case" to the contrary.

After Schlosser's motion for reconsideration was heard and denied, the court granted judgment for Town, and dismissed Schlosser's petition. Schlosser filed a timely notice of appeal.

DISCUSSION

Exhaustion of Administrative Remedies

"It is a basic rule that judicial review of administrative rulings is not granted unless the party seeking relief has exhausted all available means of administrative review. [Citation.]" *(Grant v. Superior Court (1978) 80* Cal.App.3d *606, 608.)* The Woodside Municipal Code provides,"An appeal may be made to the Planning Commission ... on any administrative determination or interpretation made by the Planning Director . . . (Sec. *9-2.1401.)* "All applications for appeals shall be received . . . not later than ten (10) calendar days following the date of the action on which such appeal is being taken." (Sec. *9-2.1404* (b).) It is undisputed that Schlosser did not exercise her right to appeal until December *17, 1991,* over a year after she was informed of the planning director's determination that she had no "vested right" to build a *12,000* square foot primary residence. Where no timely appeal is taken, "there is a failure to exhaust administrative remedies, and mandamus will not lie." *(Grant v. Superior Court, supra, 90* Cal.App.3d at p. 609.)

On appeal, Schlosser maintains that neither the September *12,* nor the October *19, 1990,* letter represented a "final official determination by the Town," and that Town was estopped to claim the bar of exhaustion by its failure to notify her of a right to appeal. As to the first assertion, we need only note that the applicable code section speaks not of a "final official determination," but of "any administrative determination or interpretation made by the Planning Director." It is indisputable that in the fall of 1990, the planning director informed Schlosser of her determination on the vested rights issue, precisely the same issue Schlosser attempted

to raise in the trial court.

Schlosser next maintains the constitutional guarantee of due process required Town to notify her of the right to appeal before relying on her failure to do so in support of its exhaustion defense. (See *Mullane v. Central Hanover Tr. Co.* (1950) 339 U.S. 306, 313 [no deprivation of life, liberty, or property without notice and opportunity for hearing].) The trial court concluded there was no such notice requirement in this case.

Schlosser relies heavily on *People v. Swink* (1984) 150 Cal.App.3d 1076, 10801082, for the proposition that notice of the right to appeal is required in order to create a duty to exhaust administrative remedies. In that case, the court reversed an order denying Swink's motion for discharge of forfeiture of cash ball she had posted to guarantee the court appearance of an acquaintance, because when that acquaintance failed to appear, she was notified that bail was forfeited and would remain so until the acquaintance appeared, but was not told that under the applicable statute, she had only six months to get her money back. (Id. at pp. 1078-1079.) The court held the notice was "constitutionally deficient because it fail[ed] to tell Swink of the statutory procedure to set aside the declaration of forfeiture, including the time period within which to do so. [Citation.]"' (Id. at p. 108 1.)

Apparently in recognition of the most obvious difference between her case and *Swink*, Schlosser asserts the due process notice requirement is not limited to "money forfeiture circumstances," but applies as well

to deprivation of property rights (*Wilson v. Health & Hospital Corp. of Marion Cty.* (7th Cir. 1980) 620 F.2d 1201, 1214-1216 [loss of rental income because of failure to notify property owner of right to contest health inspection results]). But the distinction between *Swink* and *Wilson* on one hand, and this case on the other, is that here there was no "forfeiture" at all. Schlosser did not *forfeit* a property right she already possessed, but rather *failed to obtain a* benefit she sought, a permit to build a structure which did not conform with current zoning regulations.

As Schlosser admits, *Mullane,* supra, 339 U.S. 306 (notice by publication of judicial settlement of accounts by trustee of common trust fund) "can be construed" as a forfeiture case, "because after settlement of accounts those beneficiaries who did not receive notice would lose rights." All the cases Schlosser cites are similarly distinguishable, in that they concern the sufficiency of notices which fail to inform the recipient of the availability of procedures for contesting termination, or forfeiture of *existing* rights or interests. *(Memphis Light, Gas & Water Div. v. Craft* (1978) 436 U.S. 1, 14-15 [termination of public utility services], *Petrillo v. Bay Area Rapid Transit Dist.* (1988) 197 Cal.App.3d 798, 808 [termination of disability benefits], *Minor v. Municipal Court* (1990) 219 Cal.App.3d 1541, 1549-1551 [cash bail forfeiture], *Nasir v. Sacramento County Off. of the Dist. Atty.* (1992) 11 Cal.App.4th 976, 985-986 [nonjudicial forfeiture of vehicle used for illegal drug trafficking].)

In *Memphis Light,* Gas & *Water Div. v. Craft,* supra, 436 U.S. at pages 9-12, the

court found utility customers had "a 'legitimate claim of entitlement' within the protection of the Due Process Clause" (id. at p. 12), because state law allowing termination of services only "for cause" and the availability of local-law remedies evidenced recognition of a constitutionally protected interest. (Id. at pp. 9-12.) By analogy, Schlosser asserts "a 'legitimate claim of entitlement' to proceed with completion of construction of her home, a fundamental vested right deserving of constitutional protection." But Schlosser incorrectly equates the "vested right" underlying the eponymous doctrine relating to land development (a right the government is estopped to deny) with a "fundamental vested right" in the sense of a right already possessed or legitimately acquired. *(Whaler's Village Club v. California* Coastal Com. (1985) 173 Cal.App.3d 240, 250.)

As the trial court remarked, "there are millions of building permits granted and rejected every day in this country," but Schlosser cites no case, nor have we found one, in which due process principles have been held to require notice of the right to appeal an administrative determination regarding a building permit. In fact, in *Park Area Neighbors v. Town of Fairfax* (1994) 29 Cal.App.4th 1442, 1444, a challenge to municipal approval of a low-income housing development, the court held that even "*misadvice by* an agency official as to the proper method of taking an administrative appeal, do[es] not excuse a prospective litigant from the requirement of exhausting administrative remedies as a jurisdictional prerequisite to resort to the courts." (Italics added.) Finally, as to Schlosser's insistence on the "unusual circumstances at

issue" here, in the absence of any authority whatsoever, "we have no discretion to relax the exhaustion doctrine" (id. at p. 1449).

In light of our conclusion that the trial court properly rested its ruling on the exhaustion doctrine, we need not consider Town's invitation to affirm on the basis of the court's comments regarding the merits of the vested rights issue.

Denial of Leave to Amend

Trial was set for February 1, 1995. As previously mentioned *(ante, p.* 4), on January 17, Schlosser filed a motion to amend her petition/complaint (§ 473, subd. (a)) to assert additional causes of action for retaliatory deprivation of federal and state civil rights (42 U.S.C. § 1983; Civ. Code, § 52.1), for a declaration that Town's 1988 ordinance restricting the allowable size of residential structures was unconstitutional as applied, and for spoliation of evidence. On January 30, the trial court denied the motion on the grounds that Schlosser failed to comply with California Rules of Court, rule 327(a) which specifies the contents of a motion to amend the pleadings, failed to justify her delay in making the motion, and failed to demonstrate that the amendments would be in the interest of justice. Trial was reset for March 14, 1995, and on February 6, Schlosser renewed the motion and moved for reconsideration of the ruling, on the grounds of judicial economy and newly discovered evidence. Again the motion was denied, this time on the ground that Schlosser failed to show new or different facts. Schlosser then filed a separate complaint containing the four proposed new causes of action. The trial court

sustained Town's demurrer on several grounds, and dismissed the complaint.

"The California Supreme Court, in *Dos Pueblos Ranch & Imp. Co. v. Ellis* (1937) 8 Cal.2d 617, set forth the basic rule applicable to the trial court's authority in determining a motion to file an amended pleading. 'No rule is more firmly established in this state than that which holds that the amendment of pleadings is within the sound discretion of the trial court. [Citations.] Where such discretion has been exercised by a trial court, a reviewing court will not disturb its action unless the record shows *a manifest* or gross abuse of discretion. [Citation.]' (Id. at p. 622; italics added.)" (Arthur L. Sachs, *Inc. v. City of Oceanside* (1984) 151 Cal.App.3d 315, 319, brackets in original, parallel citation omitted.) "The burden is on the p[etitioner] to demonstrate that the trial court abused its discretion. [Citation.]" *(Sullivan v. City of Sacramento* (1987) 190 Cal.App.3d 1070, 1081.) Among other things, "the belated presentation of the amendment [is an] appropriate matter[] for the reviewing court to consider in evaluating the trial court's exercise of discretion. [Citations.]" *(Roemer v. Retail Credit Co.* (1975) 44 Cal.App.3d 926, 939.)

Schlosser claims she simply wished to amend her petition/complaint "to conform to facts which came to light only during the process of discovery directly preceding trial." She calls our attention to her attorney's declaration in support of the renewed motion/motion for reconsideration and exhibits thereto. In this declaration, Schlosser's attorney states that newly discovered evidence "suggested *confirmation* of

the improper motive facts detailed in the prior declarations of Richard Rhodes, Carol Fisch and Peter Bullock (attached hereto as Exhibits 'C', 'D' and 'E'), which discussed the retaliatory nature and bias of the Respondent's activity." (Italics added.) The declarations of former Town council members Rhodes and Fisch, and of Schlosser's husband Peter Bullock, were executed on February 22, February 11, and November 21, 1994, respectively, and originally submitted in opposition to Town's motion for protective order. Bullock declared he had been acting on his own and his wife's behalf in interactions with Town concerning development of their property, and recounted events dating back to 1988 (supported by hundreds of pages of documentary exhibits) which constitute the factual underpinning of Schlosser's retaliation and bias claims. Thus, as Schlosser elsewhere admits, she had "previously obtained evidence" of the essential facts underlying her new causes of action, which was merely "confirmed" by additional, newly discovered evidence. This fact undermines her contention that her delay in moving to amend was -attributable to [Towns failure to comply with discovery requests" and/or "arose as a result of discovery restrictions" imposed by a protective order (§ 2025, subd. (i)(10)) limiting the scope of former Town council member Jeanne Dickey's deposition. Rather, Schlosser "had had the evidence and the opportunity to suggest this amendment earlier." *(Englert v. Ivac Corp.* (1979) 92 Cal.App.3d 178, 190.) "Unwarranted delay, without more can be a valid reason for denying a motion to amend [citation]." (Ibid.) It cannot therefore be said the trial court manifestly abused its discretion in denying Schlosser's motions to amend.

DISPOSITION

The judgment is affirmed.

Walker, J.

We concur:

Phelan, P. J.

Parrilli, J.

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN MATEO

Case No. 370172

ORDER DENYING PETITIONER'S MOTION FOR RECONSIDERATION

ELKE SCHLOSSER,

Petitioner and Complainant,

v.

TOWN OF WOODSIDE, a municipal corporation, TOWN COUNCIL OF THE TOWN OF WOODSIDE and CURTIS S. WILLIAMS, Planning Director of the TOWN OF WOODSIDE

Respondents and Defendants.

The Motion for Reconsideration of Petitioner Elke Schlosser came on regularly for hearing by the Court on February 25, 1997 in Department 6, the Honorable James L. Browning, Jr. Presiding. Petitioner and moving party appeared by her counsel John B. Keating. Respondents and opposing parties appeared by their counsel Jean B. Savaree and Jerry Nastari.

The court after oral argument and on proof made to the satisfaction of the Court, and on good cause appearing therefore, orders that the Motion for Reconsideration be denied.

Dated: 3/4/97

James L. Browning, Jr,

Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN MATEO

Case No. 370172
JUDGMENT

ELKE SCHLOSSER,

Petitioner and Complainant,

v.

TOWN OF WOODSIDE, a municipal corporation, TOWN COUNCIL OF THE TOWN OF WOODSIDE and CURTIS S. WILLIAMS, Planning Director of the TOWN OF WOODSIDE

Respondents and Defendants.

This matter came on for trial on November 21, 1996 and January 6, 1997. The Petitioner appeared through her attorney of record John B. Keating. Respondents appeared through their attorneys of record Jean B. Savaree and Jerry Nastari.

The Court reviewed the administrative record, briefs filed by both parties and heard arguments by all counsel. Good cause appearing therefore the Court finds that Plaintiff failed to exhaust her administrative remedies. Based upon this finding the Court orders as follows:

1. Judgment is granted to Respondents and the Petition is dismissed.

2. Costs are granted to Respondents.

James L. Browning, Jr.

Judge of the Superior Court